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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,983	03/10/2004	Jerry V. Mayeux	30310-US-548	5003
5179	7590	03/09/2006		
PEACOCK MYERS, P.C.		EXAMINER		
201 THIRD STREET, N.W.		MCCORMICK EWOLDT, SUSAN BETH		
SUITE 1340		ART UNIT		PAPER NUMBER
ALBUQUERQUE, NM 87102		1655		

DATE MAILED: 03/09/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/797,983	MAYEUX, JERRY V.	
	<b>Examiner</b>	<b>Art Unit</b>	
	S. B. McCormick-Ewoldt	1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

- 1) Responsive to communication(s) filed on 20 January 2006.
- 2a) This action is FINAL.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

- 4) Claim(s) 7,8,20-37 and 83-92 is/are pending in the application.
- 4a) Of the above claim(s) 35-36, 85-86, 88-92 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 7,8,20-34,37,83,84 and 87 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_.

**DETAILED ACTION**

The amendment of October 17, 2005 is hereby acknowledged and entered.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**Election/Restrictions**

Applicant elected Group II and species, nitrogen and calcium, in the reply filed on May 5, 2005.

**Claims Pending**

Applicant has cancelled claims 1-6, 9-19 and 38-82. Claims 35-36, 85-86 and 88-92 are withdrawn. Claims 7-8, 20-37 and 83-92 are pending. Claims 7, 8 20-34, 37, 83-84 and 87 were examined on the merits.

**Claim Rejections - 35 USC § 102**

Claims 7 and 20, 24-29 are rejected under 35 U.S.C. 102(b) as being anticipated by Tien-Lai (GB 2 191 929 A) as stated in the previous Office action. Applicant's arguments filed October 17, 2005 have been fully considered but they are not persuasive.

Tien-Lai (GB 2 191 929 A) disclose using yeast, *Capsicum*, water and a nutrient mixture wherein the nutrient mixture can include sugar, salt or flour which are enough nutrients to ferment yeast (whole document). Calcium is also present in the form of cheese (column 2, line 110). Thus, the ingredients used by Tien-Lai meet the limitations of claim 7 as the composition comprises yeast, *Capsicum*, water and a nutrient mixture and thus anticipates the claimed invention.

**Applicant argues** that Tien-Lai does not disclose the oil nor oil being layered over the fermentation mixture. This is not found persuasive because the oil is present in the mixture and is mixed which would be layered on the oil (column 1, lines 39-47; column 2, lines 98-99).

**Applicant argues** that Tien-Lai is directed to a recipe for making bread. This is not found persuasive because a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making,

the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

*Claim Rejections - 35 USC § 103*

Claims 7-8, 20-34, 37 and 83-84 and 87 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Tien-Lai (GB 2 191 929 A), Flenø *et al.* (US 5,972,642) and Todd (US 6,074,687) as stated previously in the prior Office action. Applicant's arguments filed October 17, 2005 have been fully considered but they are not persuasive.

Tien-Lai (GB 2 191 929 A) discloses using capsicum sauce, yeast, sugar, water, chili powder and chili oil which is fermented together to make a bread (whole document). Tien-Lai does not teach using nitrogen and calcium mixture.

Flenø *et al.* (US 5,972,642) disclose a fermented yeast culture comprising carbohydrate, nitrogen, and micronutrients such as calcium, in a food or feed for animals (column 1, lines 17-20; column 10, lines 44-48; column 11, lines 30-31, 38-45; column 16, lines 49-52).

**Applicant argues** that the combination of Tien-Lai, Flenø and Todd would yield a modified baking recipe, not the present invention. This is not found persuasive because a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

**Applicant argues** that Tien-Lai does not disclose the oil (page 6, third paragraph of remarks). This is not found persuasive because Tien-Lai discloses the use of oil as disclosed in the prior Office action (column 2, line 47; column 3, lines 2 and 97).

Thus, it was known in the art at the time of the invention that it is routine to add ingredients such as nitrogen and calcium to a medium that is fermented by yeast. A person of ordinary skill in the art would therefore expect that adding nitrogen and calcium to the

composition of Tien-Lai would be useful in creating an environment suitable for yeast fermentation. Based on this reasonable expectation, a person of ordinary skill in the art would have been motivated to add calcium and nitrogen to the composition taught by Tien-Lai.

Taken together, Tien-Lai and Flenø teach a composition comprising yeast, capsicum, sugar, water, chili powder, chili oil, nitrogen and calcium. However, the references do not teach using *Capsicum chinensis* in the composition. Todd (US 6,074,687) teaches that *Capsicum chinensis* is commonly used in food and beverages to improve the flavor of the food product (column 1, lines 36-39 and column 6, line 17). Thus, a person of ordinary skill in the art would reasonably expect that *Capsicum chinensis* could be added to the food composition taught by Tien-Lai and Flenø to further improve the flavor of the composition. Based on this reasonable expectation of success, a person of ordinary skill in the art would be motivated to modify Tien-Lai and Flenø in such a manner.

It would clearly have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine an effective amount fermented yeast and nutrients and micronutrients, based upon the beneficial teachings provided by the cited references, as discussed above. The adjustment of particular conventional working conditions is deemed merely a matter of judicious selection and routine optimization, which is well within the purview of the skilled artisan.

Claim 7-8, 20-34, 84 and 87 remain rejected under 35 U.S.C. 103(a) as being unpatentable over JP-08099813 A (English translation provided) in view of Flenø *et al.* (US 5,972,642) as stated in the previous Office action. Applicant's arguments filed October 17, 2005 have been fully considered but they are not persuasive.

JP-08099813 discloses using capsaicin and fermenting wild yeast in a composition to be used as plant growth regulators. JP-08099813 does not disclose using a nutrient medium. However, saccharide or starch can be used as a nutrient medium ([0005]).

Flenø *et al.* (US 5,972,642) disclose a fermented yeast culture comprising carbohydrate, nitrogen, and micronutrients such as calcium, in a food or feed for animals (column 1, lines 17-20; column 10, lines 44-48; column 11, lines 30-31, 38-45; column 16, lines 49-52).

Applicant argues that the combination of JP-08099813 and Flenø would yield a modified plant growth regulator, not the present invention. This is not found persuasive because a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

Thus, it was known in the art at the time of the invention that it is routine to add ingredients such as nitrogen and calcium to a medium that is fermented by yeast. A person of ordinary skill in the art would therefore expect that adding nitrogen and calcium to the composition of JP-08099813 would be useful in creating an environment suitable for yeast fermentation. Based on this reasonable expectation, a person of ordinary skill in the art would have been motivated to add calcium and nitrogen to the composition taught by JP-08099813.

Thus, the rejections are deemed proper and are maintained.

#### Summary

No claim is allowed.

#### Correspondence

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Susan B. McCormick-Ewoldt whose telephone number is (571) 272-0981. The Examiner can normally be reached Monday through Thursday from 6:00 a.m. to 4:30 p.m.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Terry McKelvey, can be reached on (571) 272-0775. The official fax number for the group is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

sbme

PATRICIA LEITH  
PRIMARY EXAMINER

A handwritten signature in black ink, appearing to read "Patricia Leith".